No. 21561

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WYOMING FARM BUREAU MUTUAL INSURANCE COMPANY, a corporation,

Appellant,

-vs.-

CURTIS L. SMITH and JAMIE L. SMITH,

Appellees.

Appeal from the United States District Court for the District of Montana

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BRIEF OF APPELLEES

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SUBJECT INDEX

TABLE OF CASES AND STATUTES CITED

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BRIEF OF APPELLEES

The precise and closely reasoned opinion of District Judge Russell E. Smith is, in our opinion, a sufficient reply to the Appellant's Brief. All of the Appellant's arguments in its Brief on appeal were presented to the District Judge and fully argued. Nevertheless, to be certain that we have fulfilled to the best of our ability our full obligation to our client, we do submit this Brief as a "point by point" reply to the Appellant's Brief and only to supplement the opinion of the District Judge.

STATEMENT OF JURISDICTION

The statement of jurisdiction found in the Appellant's Brief is incorporated herein.

STATEMENT OF THE CASE

The Appellant's statement of the case is insufficient. Under Rule 18(e) 3 of the Rules of the United States Court of Appeals for the Ninth Circuit, the following statement of facts is respectfully submitted.

Wyoming Farm Bureau Mutual Insurance Company, hereafter referred to as Wyoming, is owned and operated by the Wyoming Farm Bureau and the Montana Farm Bureau. Both Corporations. Any person wishing to purchase insurance protection from Wyoming must be a member of either the Wyoming Farm Bureau or the Montana Farm Bureau. Upon becoming a member of the Farm Bureau and paying the membership fee, the Appellees herein, Curtis L. and Jamie L. Smith, husband and wife, were eligible to purchase insurance coverage through Robert L. Everhard, the General Agent and the exclusive agent for Wyoming in the County of Granite, State of Montana. (TR. P. 22, 23).

On the evening of January 24, 1964, Mr. Everhard went to the home of the Appellees for the purpose of selling Mr. and Mrs. Smith some fire insurance protection on their poultry house. The amount of coverage was decided upon and Mr. Everhard indicated to the Appellees that their property would have insurance protection as of January 25, 1964. Whereupon

Mr. Smith signed the papers offered by Mr. Everhard and paid to Mr. Everhard the full premium of SIXTY-SIX DOLLARS ($66.00). (TR. P. 23).

Wyoming had furnished Everhard with application forms and with the exception of the signature of Smith, the form was completed in the handwriting of Everhard. The form contained the names of the parties, a description of the property, the fire insurance rate, the amount of insurance coverage on the property that was insured and the amount of the total fire premium. (TR. P. 16 and 17).

It also contained in the upper right hand corner of the front page a printed box which allowed the policy term to be inserted. (TR. P. 16).

This box on the completed application showed the policy term to be for 365 days — From: Jan. 25, 1964 To: Jan. 25, 1965. (TR. P. 16).

It also contained on the reverse side the following:

> "It is understood and agreed that the insurance herein applied for shall not be effective unless and until approved by the Company at its office in Laramie, Wyoming."

There was no language in the application, as there is in some, that the agent had no power to alter any of the terms of the application. (TR. P. 16, 17 & 26).

A fire destroyed the poultry house and when the loss was reported to Everhard, he advised the Smiths that Wyoming had rejected their application. (TR. P. 23)

ARGUMENT AS TO THE RECORD

Appellant in its Brief points out that the question with which we are concerned in this Appeal is the nature and effect of the transaction between Everhard and the Smiths on January 24, 1964. (App. Br. P. 7)

The Trial Court pointed this out in its opinion. (TR. P. 24, Para. 1). The opinion then proceeds to outline its findings *based on the evidence adduced at the trial and the law applicable thereto.*

The Appellant in his Brief (P. 4) maintains that there were no findings of fact and conclusions of law, as such. But, the Trial Court has indicated that its opinion constitutes the Court's findings of fact and conclusions of law. (TR. P. 22)

The Appellant then alludes to the immateriality of the lack of specific findings of fact (APP. BR. P. 4) and then summarizes an argument which is *based on facts that do not appear in this record.*

In its argument, Appellant comments on what the evidence *undisputedly* revealed about agent Everhard's state of mind. (TR. P. 8, 17) and his custom or practice (TR. P. 17). Nowhere in the transcript or record of this case does any of this evidence appear.

Appellate rules do not require the transcript, or even a part of it, to be a part of the record on appeal, but it is the contention of the Appellee that the Court on appeal can only decide questions which can be determined from what record there is before it, and that all others must be presumed waived. SPRINGER V. BEST C.A. 10th (1959) 264 F 2d 24.

Certainly it is the duty of the Appellant to preserve in the record all matters which may bear upon the errors assigned by the Appellant. PERESIPKA V. ELGIN, J. & E. RR. CO. CA IND. (1954) 217 F 2d 182.

And where that record does not include any of the evidence adduced at trial, the findings of the trial court cannot be controverted on appeal. WHITELEY V. FORMOST DAIRIES CCA ARK. (1958), 254 F 2d 36.

Appellee respectively contends that the District Court's findings are presumptively correct, and in the absence of a proper record, (shown to contain all of the evidence essential to enable the Circuit Court to determine the correctness or incorrectness of the challenged findings) must not and cannot be questioned on review. SUBLETTE V. SERVEL, INC. CCA ARK. (1942) 124 F 2d 516.

In the case of WATSON V. BUTTON, CA ORE. (1956), 235 F 2d 235, the Court said:

> "An Appellant must include in the record to C.C.A. all of the evidence upon which the District Court might have based its findings, which are claimed to be erroneous, and if this is not done, the Judgment must be affirmed."

It is respectfully contended that the Appellant has not submitted such a record in this case and that the findings of the District Court should be affirmed.

QUESTION PRESENTED

What was the legal effect of what took place in the Smith home on the night of January 24, 1964? (TR. P. 24).

The question of the dispute as to what was said about when coverage would go into effect was submitted to the Jury by way of special interrogatories and it was decided by the Jury that the agent, Mr. Everhard, *told the Smiths that their property would be insured on January 25, 1964.* (TR. P. 25)

ARGUMENT

Wyoming, through agent Everhard, sold fire insurance coverage to the Smiths, told them they were covered as of January 25, 1964 (TR. P. 25) and accepted the first annual premium (TR. P. 13). Everhard did not notify the Smiths of the declination of coverage until after the fire loss occurred. (TR. P. 14).

AS TO SPECIFICATION OF ERROR NO. 1

Appellant refers to RCM 1947 Section 2-123 and contends that Everhard's actual authority is governed by the Standard Agent's Agreement (TR. P. 18-21). We agree that this may be true as between Everhard and Wyoming but not as to the Smiths. There is nothing in this transcript which shows that the Smiths even knew of the existence of the contract. (TR. P. 26).

And as the Trial Court pointed out (TR. P. 26) "a principal is in no position to urge that general and undisclosed limitations of the agent's power prevent that contract from arising."

Apparent authority is equal to real authority when the agent's limitations are unknown to the applicant; moreover, the forms furnished an insurance agent are

evidence of his authority and are representations to the public concerning his authority. PACIFIC MUTUAL LIFE INS. CO. OF CALIF. V. BARTON, 50 F 2d 362, CCA FLA. (1931).

The general rule applicable is stated in PAGNI V. NEW YORK LIFE INS. CO. 23 P 2d 6 WASH. (1933):

> "An Insurance Company is bound by all acts, contracts, or representations of its agent, whether general or special, which are within the scope of his real or apparent authority, notwithstanding they are in violation of private instructions or limitations upon his authority, of which the person dealing with him acting in good faith, has neither actual nor constructive knowledge."

As the Court pointed out in its opinion (TR. P. 26) Everhard had actual authority to do what he in fact did, i.e., to take the application and to show the policy term on that application.

As to the Appellant's argument that Everhard could not have believed himself to possess such actual authority, there is nothing in the record to support this contention. But, *there is evidence in the record that he told the Smiths that they were covered as of January 25, 1964.* We again submit that the fact findings in this case have been made by the Trial Court and in the absence of a proper record cannot be the basis for any argument by Appellant.

AS TO SPECIFICATION OF ERROR NO. 2

This specification of error as to the Trial Court concluding that Everhard had *implied authority* to bind Wyoming (App. Br. P. 4) is not supported by any

argument in the Brief and therefore must be deemed as waived. ASHLEY V. SAFEWAY STORES, INC. 100 MONT. 312, 322, 47 P 2d 53 (1935).

This Trial Court held that where an agent is authorized to use a form in the solicitation of business and is authorized to complete the form in a particular way, he has as a matter of law an *implied authority to explain the meaning of the writing.* (TR. P. 26).

AS TO SPECIFICATION OF ERROR NO. 3

This specification of error is concerned with ostensible or apparent authority and cites the case of WEIDENAAR V. NEW YORK LIFE INSURANCE CO. 36 MONT. 592, 94 Pac. 1., (1908) as supporting the contention that the language in the application was sufficient notice to the Smiths that Everhard's authority was limited insofar as binding Wyoming to a contract for fire insurance.

A review of the case will reveal that Weidenaar can readily be distinguished. It is an action for money paid on a promissory note decided in 1908. It was a 2 to 1 decision and had a bizarre set of facts:

> "An applicant for insurance, unable to read or write English, signed a note for the premium on an insurance policy. Without knowledge of his rejection in that company, he signed another note by which that note was taken up, on representation made by the agent of the company, who falsely introduced another person as agent of the New York Life Insurance Company, that he could get a better policy in that company. The agent of the first company procured an application from the agency director of the New York Life, who had power to hire agents, with the con-

sent of the company, on a brokerage basis, which the company had knowledge its agents used at times, and the applicant signed such application in the presence of his daughter, two sons, and another person, without question. The policy, with the medical examination, was then returned by the agent to the agency director, who, in his own name, witnessed the signature, and sent in the policy and accepted $5, which the agent falsely claimed had been paid him. No receipt for advance premiums, as provided by the policy, had been signed or detached. Held, that under Montana statutes determining authority of agents, and defining actual and implied authority, the facts did not show that the agent of the first company was hired by the director of New York Life as agent, and that the maker of the note, on its negotiation and coming into the hands of a third person, could not hold the New York Life for the amount thereof, as the maker was charged with constructive notice of the lack of power of the agent."

The plaintiff was found guilty of gross negligence in signing the note as he did. *There was, in fact, no agency and no ratification.* A strong dissent was entered by one of the three Justices that heard the case. As pointed out in Appellant's Brief (p. 15) a crime was in fact committed. Therefore, we submit that the Weidenaar Case decision is not applicable to this case.

AS TO SPECIFICATION OF ERROR NO. 4

The Trial Court in its opinion (TR. pp. 24, 25) concluded that the evidence was *undisputed* that it was the practice of the company to accept applications on this form and then to retroactively date the policy according to the effective date of the term shown in the application. In fact, the Smiths purchased an automobile liability policy a few days after the 24th

day of January and when delivered, the policy effective date was the same as that shown on the application. (TR. p. 25).

As authority for rejecting the Court's finding that the policy term as written in the application determines the effective date of coverage, Appellant cites the case of MOFRAD V. NEW YORK LIFE INS. CO. (CCA 10th UTAH) 206 F 2d 491 (1953). (App. Br. P. 11) A reading of the Mofrad case immediately points out a distinguishing feature. In that case there was no evidence that the applicant was told *that coverage would be effective immediately.* This point was brought out in the case of GETTINS V. U. S. LIFE INS. CO., 6th Circuit, 221 F 2d 782, (1955) when the Mofrad case was cited along with another case and was distinguished in this language:

> "In each of those two cases the Courts pointed out the absence of evidence to show that the applicant was misled into believing that the policy would be effective prior to medical examinations. By contrast, *it is the existence of such evidence* upon which Appellants rely in the present case." (emphasis ours)

The evidence in the Mofrad case clearly showed that the applicant was aware that he must comply with certain requirements. Whereas, in this case, the evidence is clear that Everhard told the Smiths that coverage commenced on the 25th of January. (TR. P. 25).

In the Appellant's Brief, in addition to the Mofrad case, are cited the cases of JONES V. NEW YORK LIFE INS. CO., (1927) 69 UTAH 172, 253 P. 200 and SHIRA V. NEW YORK LIFE INS. CO., 10 CIR (1937), 90 F 2d 953. These cases hold that it is with-

in the rights of, and competent for, the parties to provide in the application under what conditions and at what time the policy should become effective and binding. In the Shira case the insured signed a separate written instrument in which he acknowledged that the policy was to take effect as of a certain date. The Courts in these cases are simply saying that it is competent for parties to agree upon a policy date. The Appellee agrees with this position. In this case the Smiths and Wyoming, through Everhard, agreed that the policy term would commence on January 25, 1964. (TR. P. 25).

Appellant contends that there is nothing novel or unfair in the issuance of insurance policies which have been dated retroactively from the date of the companies acceptance of the application (App. Br. P. 11) and again cites the Mofrad Case. *The learned Trial Court thought it unfair.* (TR. P. 25). Other Courts have dealt with this topic. In the case of RANSON V. THE PENN MUTUAL LIFE INS. CO. 274 P 2d 633 (CALIF. 1954) the court declared that this would not be dealing honestly with the insured and cited as authority the cases of ALBERS V. SECURITY MUTUAL LIFE INS. CO., 170 NW 159 (S.D.) (1918) and REYNOLDS V. N. W. MUTUAL, 176 N.W. 207 (IOWA). If there is nothing novel or unfair about accepting money as payment of a premium for that period during which there is no coverage afforded, then the insurance company guilty of this practice has disproved the theory that no one ever gets something for nothing.

The Appellant, on P. 12 of its Brief, contends that the Trial Court selected the policy term portion of Wyoming's application and Everhard's acts in completing this portion of the application as the single basis for fixing the effective date of the fire insurance contract which it found was in existence in this case. Query — in the absence of the issuance of the formal written policy, what else is necessary? Everhard was the agent for Wyoming and when the Smiths asked for fire coverage, he told them they would have coverage as of January 25, 1964 and wrote this date in the appropriate box in the application. Based on all of the evidence before it, not just this single basis, the Trial Court found that a contract of insurance did result. (TR. P. 27). In its transcript on appeal the Appellant could have included all the evidence that was available to the Trial Court. It chose not to do so. How can Appellant justify this action and yet seriously contest the findings of the Trial Court.

Next, Appellant challenges the Court's failure to follow case law which Appellant contends is applicable. The case of KENNEDY V. MUTUAL BENEFIT LIFE INS. CO. of Newark, N.J., 205 F 677 (1913) is cited as being *almost* identical on the facts. There is nothing in the Kennedy case, as there is nothing in the Mofrad case, and the Jones case, and the Shira case, supra, about the applicant being misled into believing that the policy would be effective prior to the medical examinations. This is clearly pointed out in the Gettins case supra.

In the Kennedy case, a microscopical examination

was required and never obtained. There was no question of agency, waiver or estoppel or oral or temporary contracts of insurance. This, then, is not legal precedent.

A review of Sheppard's Montana Citations will show that the Weidenaar case has been followed, as to the point relied upon by the Appellant, *not one single time.* There have been only five cases wherein the Weidenaar case was referred to and in each instance it was in connection with the legal point of ratification.

The Montana Supreme Court in BAKER V. UNION ASSUR. SOC. OF LONDON LTD., 81 MONT. 281, 297, 264 Pac. 132 (1928) adopted language which illuminates the inherent reaction of Judges and Juries in these cases and the motivation which has shaped and written the legal guideline:

> "The insured deals with no one but the agent; the company cannot deal with its patrons in any other way. Justice and law, therefore, require that the company shall be held to sanction what the agent agrees to, and upon which the insured relies. To allow the company to enforce a condition or forfeiture of the policy for a neglect to do that which the agent informs the insured shall not avoid the policy, would work the greatest injustice."

Appellant then attempts to distinguish the case of MAYFIELD V. MONTANA LIFE INS. CO., 62 MONT. 535, 205 P. 669 (1922) from our instant case. At P. 17 of its Brief the Appellant maintains that the undisputed evidence revealed that Everhard believed he did not have authority to bind the com-

pany, regardless of what his representations might have led the Smiths to believe. Again, *nowhere in the record is there any evidence of this state of mind of Everhard* and therefore this argument must fail. The same reasoning applies to the statement (P. 17 App. Br.) . . . "the undisputed evidence of the custom or practice of Everhard in this regard, is to the contrary." The Mayfield case and this case have these facts in common:

1. The premium for the first years coverage was paid to the agent.
2. The agent represented to the applicant that coverage was to go into effect at once.
3. In both cases this representation was made in the face of a printed paragraph which stated that the insurance would not take effect until approval by the home office.

The Court in the Mayfield case held:

> "Under these allegations the general agent, Gutch, was clothed, prima facie, with the ostensible authority to, and did, *waive the conditions of the receipt* issued to Mayfield, and that his agreement that the insurance should be in force from the date of its issuance was binding upon the company. . ." (Emphasis ours)

The Trial Court in this case has held:

> "The standard agent's agreement, whatever its effect as between the company and the agent, is not conclusive as to third parties. Everhard did have authority to take the application, and he did have authority to show the policy term on the application exactly as he did show it." (TR. P. 26)
>
> * * * * *
>
> "And if the words used by Everhard are to be interpreted in the sense that the Smiths under-

> stood them as Montana Law requires, then a contract of insurance did result and the Plaintiff is liable." (TR. P. 27)

The Court, in its opinion, (TR. P. 27) in comparing the Mayfield case to the case before it said:

> "Whether Everhard was a general agent or not, the authority given as to the term of insurance matter was sufficient to empower him *to waive the clause*, at least to the extent indicated in the opinion." (TR. P. 27 Note 6) (Emphasis ours)

The Appellees respectfully contend that the Trial Court followed the existing law of the State of Montana and cited Montana cases where it deemed it necessary to do so.

AS TO SPECIFICATION OF ERROR NO. 5

NEXT THE APPELLANT CONTENDS THAT THE LEGAL AUTHORITIES SET FORTH IN THE DISTRICT COURTS OPINION AND DECISION ARE NOT APPLICABLE.

Appellee has already discussed the applicability of the Mayfield case supra, and will not repeat that argument here.

Next, the Appellant claims that RCM 1947, Sections 13-715 and 13-717 are not properly in question, because these sections are concerned with a contract *that was otherwise legally entered into.* It seems clear to the Appellee that the *Trial Court found that a contract had, in fact, been legally entered into* and was citing these sections as authority for the position that all of the essential elements of a valid and binding contract were found in what took place between the parties on January 24, 1964.

The Court held that there was a *temporary contract* of *insurance* (TR. P. 28) made on that night. RCM 1947 Section 40-3726, provides for such contracts of insurance in these words:

> "1. Binders or other contracts for temporary insurance may be made orally or in writing, and shall be deemed to include all the usual terms of the policy as to which the binder was given. . ."

The leading case in Montana which recognizes and approves an oral or temporary contract of insurance is AUSTIN V. NEW BRUNSWICK FIRE INS. CO., 111 MONT. 192, 108 P 2d 1036 (1940). In that case the court held:

> "If the minds of the parties have met on the essential parts of the contract, it makes no difference whether the form of the insurance contract is oral or written."

* * * * *

In the Court's opinion (TR. P. 28) the court makes it clear that its decision is based upon an estoppel constituting the company's acceptance of the contract of temporary insurance found in this case. And there is ample authority for the court's position under Montana cases. In LINDBLOM V. EMPLOYER'S LIABILITY ASSURANCE CORP. 88 MONT. 488, 500; 295 P. 1007, the Court held:

> "Where a principal makes it possible through his acts for his own agent to inflict injury, the result of such injury should not be passed on to innocent persons who have dealt with the agent in good faith under his apparent authority. The law forbids the principal to deny authority in the agent, which his own conduct has invited those with whom he was dealing to assume he possessed. In such a case, a principal is bound

by his acts and estopped by his own conduct from denying the authority of the agent to act."

* * * * *

CONCLUSION

The Trial Court after hearing *all the evidence* (which the Appellant has not made available to the Circuit Court) submitted special interrogatories to the Jury (TR. P. 25). The Jury found that Everhard had indicated to the Smiths that their property would be insured on January 25, 1964.

Based on what actual authority the evidence disclosed Everhard to possess in his capacity as agent for Wyoming, the Court held as a matter of law that he had the implied authority to explain the acts which were within the scope of his actual authority and to thus bind Wyoming to a contract of temporary insurance. The Court held further that Wyoming could not deny that contract by relying on *general and undisclosed* limitations on the agent's power.

The Appellees submit that this is a decision which is not only sound on the law but which in all justice is the only result possible to reach on the facts.

It is respectfully contended that the Judgment of the District Court should be affirmed.

Respectfully submitted,

KNIGHT & DAHOOD

By .....

Attorneys for Appellees,
Curtis L. Smith and
Jamie L. Smith.

CERTIFICATE

I CERTIFY that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing Brief is in full compliance with those rules.

KNIGHT & DAHOOD

By .....

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